

## LEGAL REVIEW NOTE

**LC#:** LC 1820, To Legal Review Copy, as of February 14, 2013

**Short Title:** Allow counties to limit percentage of property owned by nonprofits

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**Date:** February 18, 2013

### CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

*As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.*

#### **Legal Reviewer Comments:**

LC 1820 authorizes a board of county commissioners to restrict the amount of land that may be acquired by nonprofit organizations in a county. Specifically, the proposed legislation restricts nonprofit ownership of land to 4% of the total percentage of land in the county. The proposed legislation authorizes voters of the county to approve a different percentage of land in the county that may be acquired by nonprofit organizations. In addition, the proposed legislation requires nonprofit organizations to submit proposed land acquisition plans to the county for approval. As drafted, the proposed legislation allows a county to *approve or deny* the proposed acquisition of the property. The provisions of LC 1820 do not disturb acquisitions that have already occurred.

#### Equal Protection

LC 1820, as drafted, may raise potential legal issues regarding conformance with the U.S. and Montana constitutions. First, because the draft places a restriction on the amount of land that may be owned by a particular type of entity, i.e., nonprofit organizations, an issue may exist as to whether the draft complies with state and federal equal protection guarantees. Article II, section 4, of the Montana Constitution provides, in part, that "No person shall be denied the equal protection of the laws." According to the Montana Supreme Court, the basic rule with respect to equal protection "is that persons similarly situated with respect to a legitimate governmental

purpose of the law must receive like treatment”. *Oberson v. USDA*, 2007 MT 293, ¶ 19, 339 Mont. 519, 171 P.3d 715.

The Montana Supreme Court applies a three-part analysis when addressing equal protection cases. First, the court will “identify the classes involved and determine whether they are similarly situated.” *Rohlfs v. Klemenhausen*, 2009 MT 440, 354 Mont. 133, 227 P.3d 42. If the classes are similarly situated, the court will determine which level of review it will apply. Strict scrutiny review applies if a suspect class is implicated or a *fundamental right* is affected. *Rohlfs*, ¶ 26. Strict scrutiny requires the government to show that the law is narrowly tailored to serve a compelling governmental interest. Private property ownership is considered by the courts to be a fundamental right. *City of Bozeman v. Vaniman*, 264 Mont. 76, 79 (1994). Therefore, a court would likely apply strict scrutiny analysis when assessing the proposed legislation’s compliance with the equal protection clause.

### Inalienable rights

The proposed legislation may also raise potential legal issues with respect to Article II, section 3, of the Montana Constitution, which addresses inalienable rights. Article II, section 3, of the Montana Constitution provides as follows:

**Section 3. Inalienable rights.** All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, **acquiring, possessing and protecting property**, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities. (Emphasis added).

Although there are few cases that assess the *right to acquire property* provided in Article II, section 3, of the Montana Constitution, an issue exists as to whether legislation may impair the right to acquire property in the manner provided in LC 1820. As noted above, private property ownership is considered a fundamental right under Article II, section 3, of the Montana Constitution.

It should also be noted that corporations, including nonprofit corporations, are treated as persons for purposes of state and federal constitutional law. *See* section 1-1-201, MCA, which defines a person as “a corporation or other entity as well as a natural person”.

### Regulatory takings

A potential issue may also exist with respect to whether the proposed legislation complies with Article II, section 29, of the Montana Constitution and the Fifth Amendment to the U.S. Constitution, which prohibit the taking of private property without just compensation. The proposed legislation may result in a scenario in which a landowner has entered into a private agreement with a nonprofit organization to sell the landowner’s property, but the nonprofit is prohibited from obtaining the property as a result of the proposed legislation. As such, the

proposed legislation may interfere with a private agreement to divest private property. However, the U.S. Supreme Court has held that “the denial of one traditional property right does not always amount to a taking”. *See Andrus v. Allard*, 444 U.S. 51 (1979) (holding that the *prohibition on the sale* of lawfully acquired property (i.e., eagle feathers) did not amount to a taking).

**Requester Comments:** None.